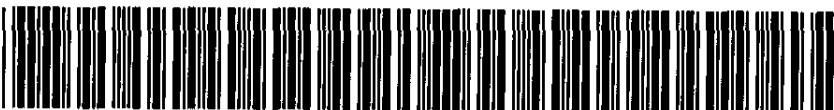
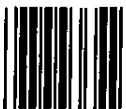
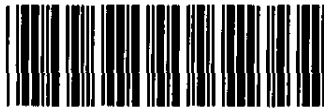


# EXHIBIT C



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIAMEDICAL INSTRUMENTATION  
AND DIAGNOSTICS  
CORPORATION,

Plaintiff,

v.

ELEKTA AB, *et al.*,

Defendants.

NO. CV-97-2271-RHW

**ORDER ON MOTIONS IN  
LIMINE**

Before the Court are various Motions in Limine offered by Plaintiff and Defendants. The Court considered these motions without oral argument.

**Plaintiff's First Motion (Non-Identified Experts)**

In this motion, Plaintiff, Medical Instrumentation and Diagnostics Corporation (Midco), seeks to bar trial testimony of five Elekta witnesses (Kall, Kelly, Jacques, Lunsford, and Roberts) because, although not identified as experts, the only foreseeable and necessary use of these witnesses in trial is to provide expert testimony.

First, the Court addresses the threshold question of whether testimony is lay testimony (not subject to the restrictions of Fed. R. Evid. 702) or expert testimony (subject to Fed. R. Evid. 702 and the disclosure requirements of Fed. R. Civ. P. 26). In 2000, Fed. R. Evid. 701 was amended to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, advisory committee notes. "The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. . . . That

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1 its counterclaims, all these counterclaims are similarly dismissed without  
2 prejudice.

3 **Defendants' Sixth Motion (Excluding Court's Pretrial Statements)**

4 In this motion, Elekta seeks an order excluding any reference to any pretrial  
5 statement, finding of fact, or ruling by the Court, other than those which may  
6 appear in the (yet to be determined) jury instructions. Midco notes two problems  
7 with this motion: (1) the problem of how the jury will learn that Elements 1, 2, 3,  
8 4, and 6 of Claim 1 of the '314 patent are not at issue in the infringement analysis,  
9 (2) the problem of how the jury will learn that, although the validity of the '314  
10 patent is at issue, the validity of the '684 and '846 patents is not.

11 The Court reserves ruling on this Motion, as these problems are best  
12 addressed during the writing of jury instructions. Once the Court has prepared  
13 jury instructions, both parties may refer to the jury instructions, but not any  
14 pretrial statements, findings of fact, or rulings by the Court. Until the jury  
15 instructions are prepared, the parties are not to refer to any such statements  
16 (pretrial statements, findings of fact, or rulings by the Court) in front of the jury,  
17 without prior approval by the Court outside the presence of the jury.

18 **Defendants' Seventh, Eighth, Ninth, and Tenth Motions (Regarding**  
19 **Midco Expert Testimony)**

20 In these motions, Elekta seeks to bar or limit Midco expert testimony.  
21 Before discussing the arguments for each witness, it is helpful to review the above  
22 discussions of Fed. R. Civ. P. 26 (on the requirements of expert reports) and Fed.  
23 R. Evid. 701 (discussing the difference between expert and lay testimony), as well  
24 as the requirements of Fed. R. Evid. 702, as discussed below.

25 If testimony is found to fall under Fed. R. Evid. 702, the Advisory  
26 Committee notes to Fed. R. Evid. 702 provide a nonexclusive, nondispositive, but  
27 nonetheless helpful checklist (taken from *Daubert* and related case law) for trial  
28 courts to use in assessing the reliability of scientific expert testimony.

1 Specifically, in determining whether expert testimony is reliable, the Court should  
2 consider (1) whether the expert's technique or theory can be or has been tested--  
3 that is, whether the expert's theory can be challenged in some objective sense, or  
4 whether it is, instead, simply a subjective, conclusory approach that cannot  
5 reasonably be assessed for reliability; (2) whether the technique or theory has been  
6 subject to peer review and publication; (3) the known or potential rate of error of  
7 the technique or theory when applied; (4) the existence and maintenance of  
8 standards and controls; (5) whether the technique or theory has been generally  
9 accepted in the scientific community; (6) whether experts are proposing to testify  
10 about matters growing naturally and directly out of research they have conducted  
11 independent of the litigation, or whether they have developed their opinions  
12 expressly for purposes of testifying; (7) whether the expert has unjustifiably  
13 extrapolated from an accepted premise to an unfounded conclusion; (8) whether  
14 the expert has adequately accounted for obvious alternative explanations; (9)  
15 whether the expert is being as careful as he would be in his regular professional  
16 work outside his paid litigation consulting; (10) whether the field of expertise  
17 claimed by the expert is known to reach reliable results for the type of opinion the  
18 expert would give. Fed. R. Evid. 702, advisory committee's note.

19 The Advisory Committee also states that "the rejection of expert testimony  
20 is the exception rather than the rule," noting specifically that "*Daubert* did not  
21 work a sea change over federal evidence law and the trial court's role as  
22 gatekeeper is not intended to serve as a replacement for the adversary system" *Id.*  
23 (internal quotes and citations omitted.)

24 Dr. Ommaya

25 Dr. Ommaya's expert report consists of six paragraphs. The report does not  
26 set forth the "opinions to be expressed and the basis and reasons therefor," as  
27 required by Rule 26. However, as previously noted, the history of this case  
28 establishes that the parties, in some circumstances, have permitted the

1 supplementation of information and opinions of experts through depositions and  
2 the filing of declarations. The deficiencies of Dr. Ommaya's expert report is  
3 mitigated by the substantial testimony in his September 22 deposition. Although  
4 the expert report violates Rule 26(a)(2)(B), the Court finds that sanctions under  
5 Rule 37(c) are unnecessary because of the parties' practice of taking depositions  
6 of witnesses even where the report was defective.

7 It appears from the record that many expert reports in this case were  
8 supplemented by depositions. Although the purpose of Rule 26(a)(2)(B) is to  
9 obviate the need for deposition, the parties appear to have agreed to take  
10 depositions rather than receive the benefits of the Rule. Had Elekta filed this  
11 motion shortly after receiving Dr. Ommaya's expert report, the Court no doubt  
12 would have either ordered Midco to supplement the expert report or stricken the  
13 expert. At this point, however, total exclusion seems too harsh a remedy, given  
14 that Elekta received adequate notice of Dr. Ommaya's anticipated expert testimony  
15 2 years ago. Furthermore, monetary penalties seem inappropriate, as many expert  
16 reports in this case were supplemented by depositions. Dr. Ommaya's testimony  
17 is limited to the issues addressed in his expert report, depositions, and  
18 declarations.

19 Carl Degan

20 Elekta argues that Mr. Degan's expert testimony should be excluded, as it  
21 fails to meet the standards for admissibility and reliability under Fed. R. Evid.  
22 702. Specifically, Elekta argues that the testimony is not "based upon sufficient  
23 facts or data," and that Mr. Degan's use of unrealistic assumptions is so egregious  
24 that the testimony cannot be the "product of reliable principles and methods."  
25 Furthermore, Elekta argues that Mr. Degan's expert opinion as to trade secret  
26 damages is inadmissible because Mr. Degan has not "applied the principles and  
27 methods reliably to the facts of the case" (specifically, Mr. Degan does not take  
28 into account the Court's recent order restricting the trade secrets case to a single

1 trade secret).

2 The Court agrees with the court in *Daubert* and the Advisory Committee  
3 that "[v]igorous cross-examination, presentation of contrary evidence, and careful  
4 instruction on the burden of proof are the traditional and appropriate means of  
5 attacking shaky but admissible evidence." Fed. R. Evid. 702, advisory committee  
6 notes. Any perceived weakness with Mr. Degan's testimony is left to the  
7 adversarial process.

8 Finally, Elekta argues that Mr. Degan's testimony should be excluded, as  
9 the expert report was not submitted on time. This argument is similar to the  
10 arguments regarding Mr. Degan in Defendants' Second Motion, and is rejected for  
11 the same reasons that it was rejected there (the tardiness of the expert report was  
12 both substantially justified and harmless).

13 Steven Smith

14 Elekta argues that Dr. Smith's expert report fails to meet the minimum  
15 requirements of Fed. R. Civ. P. 26, and that his testimony does not meet the  
16 reliability requirements of Fed. R. Evid. 702. Elekta's objections to Dr. Smith's  
17 expected testimony do not have the required specificity for an in limine decision,  
18 and the Court finds that these are better considered on a case-by-case basis at trial.

19 Dr. Tyrone Hardy

20 Although Midco has not yet attempted to qualify Dr. Tyrone Hardy as an  
21 expert witness, and has not evidenced an intent to have him testify as an expert,  
22 Elekta believes that Midco plans for Dr. Tyrone Hardy to give expert testimony.  
23 It is clear that he was deposed at length and can testify about his invention and  
24 related issues that involve his expertise as the inventor. Many of Elekta's  
25 objections to Dr. Tyrone Hardy's expected testimony do not have the required  
26 specificity for an in limine decision, and the Court finds that these are better  
27 considered on a case-by-case basis at trial. To the extent that they are specific,  
28 Elekta's objections to Dr. Tyrone Hardy's expected testimony are best resolved

1 through the adversary process of vigorous cross-examination and presentation of  
2 contrary evidence. Regarding Dr. Tyrone Hardy, Midco's Tenth Motion in Limine  
3 is denied subject to renewal at trial.

4 Dr. George

5 Elekta argues that Dr. George's expert testimony is barred because his  
6 expert report was filed late. Midco replies that the report was late because Elekta  
7 improperly withheld technical information. The Court can not yet determine the  
8 harm, if any, that Elekta suffered due to the untimeliness of the report. Elekta's  
9 motion is denied subject to renewal at trial.

10 **Defendants' Eleventh Motion (Limiting Expert Testimony to Subject**  
11 **Previously Addressed)**

12 This motion deals with whether the expected testimony of Plaintiff's  
13 witnesses corresponds with the previous disclosures of those witnesses. The rule  
14 is abundantly clear that testimony is limited to subjects previously addressed and  
15 topics identified in the witness list, so it is unclear what Elekta stands to gain  
16 through this motion--presumably only that if witnesses go outside of the lines they  
17 will be disobeying not only a rule of civil procedure but also an order of this  
18 Court. Any dispute that Elekta has about a Plaintiff's witness exceeding the  
19 permissible bounds of testimony is best handled when the witness testifies. The  
20 Court, thus, reserves ruling on this Motion; Elekta is instructed to raise any  
21 specific objections regarding this matter when specific witnesses testify, and the  
22 Court will rule at that time.

23 **IT IS HEREBY ORDERED**

24 1. Plaintiff's First Motion In Limine (Ct. Rec. 409) is granted in part and  
25 denied in part, as outlined above.

26 2. Plaintiff's Second Motion In Limine (Ct. Rec. 410) is granted in part, as  
27 outlined above. The portion of this motion dealing with the '314 prior art exhibits  
28 is referred to Magistrate Judge Ruben Brooks for decision.



1 3. Plaintiff's Third Motion In Limine (Ct. Rec. 411) is denied, subject to  
2 renewal at trial.

3 4. Plaintiff's Fourth Motion In Limine (Ct. Rec. 412) is referred to  
4 Magistrate Judge Brooks for decision.

5 5. Plaintiff's Fifth Motion In Limine (Ct. Rec. 413) is granted in part and  
6 denied in part, as outlined above. The portion of this motion dealing with "Failure  
7 to Disclose Commentary" is referred to Magistrate Judge Brooks for decision.

8 6. Defendants' First Motion In Limine (Ct. Rec. 397) is granted.

9 7. Defendants' Second Motion In Limine (Ct. Rec. 398) is granted in part  
10 and denied in part, as outlined above.

11 8. Defendants' Third Motion In Limine (Ct. Rec. 399) is referred to  
12 Magistrate Judge Brooks for decision.

13 9. Defendants' Fourth Motion In Limine (Ct. Rec. 400) is granted in part  
14 and denied in part, as outlined above.

15 10. Defendants' Fifth Motion In Limine (Ct. Rec. 401) is granted. All  
16 unpursued claims and counterclaims on the five patents listed in the Complaint are  
17 dismissed without prejudice.

18 11. The Court reserves ruling on Defendants' Sixth Motion In Limine (Ct.  
19 Rec. 402).

20 12. Defendants' Motions In Limine addressing Midco expert testimony (Ct.  
21 Rec. 403, 404, 405, 406) are granted, denied, or reserved, as outlined above.

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1 13. The Court reserves ruling on Defendants' Eleventh Motion In Limine  
2 (Ct. Rec. 407).

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
4 this order and to provide copies to counsel.

5 **DATED** this 10 day of January 2002.

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7  
8 **ROBERT H. WHALEY**  
United States District Judge

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